TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900

No. 167

ABRAM P. THOMPSON, PLAINTIFF IN ERROR,

vs.

JOSEPH J. DARDEN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED NOVEMBER 24, 1900.

(19,170.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 519.

ABRAM P. THOMPSON, PLAINTIFF IN ERROR,

vs.

JOSEPH J. DARDEN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

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1 In the Supreme Court of Appeals of Virginia, at Richmond.

DARDEN (Pilot)
vs.
THOMPSON, Master of the Schooner "Wm. Neely."

To the honorable judges of the supreme court of appeals of Virginia:

The petitioner, Joseph J. Darden, (pilot,) respectfully represents that he is aggrieved by a final judgment of the court of law and chancery, of Norfolk, Virginia, entered on the 12th day of February, 1903, entering up judgment for the defendant upon his demurrer to the petitioner's declaration against the said defendant.

The transcript of the record in the case in which said judgment was entered is herewith filed, from which it will appear that the said case was as follows:

At the rules held at the clerk's office in said court on the first Monday in September, 1902, the plaintiff filed his declaration against the defendant for the recovery of pilotage charges:

That thereafter, on the 1st day of October, 1902, the defendant filed his demurrer to the said declaration and each count thereof, and his plea of non assumpsit, and the plaintiff joined in the said demurrer and replied generally to the said plea:

That afterwards, on the 11th day of October, 1902, the
2 court sustained the defendant's demurrer to the said declaration, and gave leave to the plaintiff to file an amended declaration:

That afterwards, on the 17th day of November, 1902, the plaintiff filed his amended declaration, in the words and figures in the transcript of the record set out, and the defendant filed his demurrer with the grounds thereof, to the said amended declaration, in the words and figures as set out in the said transcript of the said record; and the plaintiff joined in the said demurrer and replied generally to said plea;

That thereafter, on the 31st day — January, 1903, the court sustained the defendant's demurrer to the plaintiff's said amended declaration, and subsequently, on the 12th day of February, 1903, gave judgment for the defendant upon the said demurrer, to which ruling and judgment of the court sustaining said demurrer and entering judgment for the defendant, plaintiff excepted.

From an examination of the amended declaration in this case, which consists only of a single count, it will appear that this is a suit by the plaintiff, as one of the licensed pilots of the State of Virginia, against the defendant as master of schooner "Wm. Neely" to recover pilotage fees, amounting to the sum of $87.75, alleged to be due to the plaintiff by the defendant by reason of the plaintiff's

offer of his services as pilot to the said defendant, and the refusal of the said defendant to accept the same.

It will also appear from an examination of the transcript of the record that the defendant demurred to the said declaration, and for reasons therefor, stated seven grounds; that the second of the said grounds of the demurrer to the said declaration is that the statutes of the State of Virginia under which the said action was brought are in conflict with section 4237 of the U. S. Revised Statutes, which section provides:

"No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage, or half pilotage, between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

Upon the said demurrer — rendered the following opinion,
3 which is here recited as a part of this petition:

Opinion of Judge W. B. Martin.

"These cases were heard on demurrer to the special counts in the respective declarations. The same question is involved, in both of these suits, to-wit: the validity of section 1965 and other sections of the Code of Virginia imposing pilotate fees upon certain vessels therein mentioned.

"Under the pilot laws, which are contained in chap. 89 of the Code of Virginia, pilotage fees are imposed upon all vessels inward bound from sea (except coasting vessels having a pilot's license) and going to Smith's point, Yorktown, Newport News or Norfolk, or any intermediate point, and likewise on all vessels outward bound to sea from said points. But vessels bound to any point on the Potomac river are excepted. The effect of the law is that no vessel sailing between any port in Virginia is liable to pilotage fees, while all vessels sailing between the points above named in Virginia and ports in other States which are reached by sea by way of the waters between the capes of Virginia, are liable to such fees. Section 4237 of the Revised Statutes of the United States provides that:

"'No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage, or half pilotage, between vessels sailing between the ports of one State and vessels sailing between the ports of different States * * * and all existing regulations or provisions making any such discrimination are annulled and abrogated.'

"I am of the opinion that section 1965 of the Code and the other provisions of the pilot law fixing pilotage fees in cases such as are mentioned in the declaration in the cases at the bar, are in conflict

with sections 4237 of the Revised Statutes of the United States, because they make discriminations as to pilotage between vessels sailing between ports of Virginia, requiring no pilotage fees as to such vessels/ and vessels sailing between Virginia ports and the ports of other States lying outside of the capes of Virginia, which are required to pay pilotage.

Undaunted, 37 Fed. 662.

Spraigue *vs.* Thompson, 118 U. S., 90.

"For this reason the demurrer to the special counts in the declaration should be sustained."

4 From this opinion it will appear that the court, without passing upon the other grounds of the demurrer, decided that the statutes of Virginia, under which this action was brought, were in conflict with section 4237 of the Revised Statutes of the United States, above set up.

Your petitioner will, therefore, first discuss the question, whether the said statutes, which are contained in chapter 89 of the Code of Virginia, edition of 1887, are in conflict with section 4237 of the Revised Statutes of the United States, and will then, briefly discuss the other grounds taken in said demurrer.

It is admitted that the acts of Congress are paramount in matters pertaining to pilots and pilotage, and the question is thus squarely presented, whether the Virginia statutes on that subject are in contravention to section 4237 of the Revised Statutes of the United States. As far back as 1789 Congress enacted: "That all pilots in the bays, inlets, rivers, harbors and ports of United States shall continue to be regulated in conformity with the existing laws of States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose until further legislative provisions shall be made by Congress."

Act of 1789, chapter IX (I. U. S. Statutes at Large 53, section 4).

This act has been held to contain "a clear and authoritative declaration by the First Congress," that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national, that it is likely to be best provided for, not by one system, or plan of regulation, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits."

Cooley *vs.* Board of Wardens of the Port of Philadelphia, 12 How., 318.

Under this contemporary construction of the Constitution, practically all of the sea coast States have, from time to time, passed acts regulating pilots and pilotage in connection with their own ports, and their constitutional right to do so has never been denied, except

when their enactments were in contravention to some act of Congress upon the same subject

That Congress has the paramount power to regulate pilotage is deducible from the constitutional grant to Congress of "power to regulate commerce with foreign nations and among the several States," and that it should have this power, is reasonable in view of the ever present possibility of conflicts between the laws of neighboring States upon this subject "deeply affecting that equality of commercial rights and that freedom from State interference which those who formed the Constitution were so anxious to secure."

(Cooley *vs.* Port Wardens, *ubi supra.*)

This apprehension on the part of the founders of our Government was in due course, realized by conflicts which arose as to pilotage rights under the laws of States of New York and New Jersey, which gave rise to the act of Congress of March 2nd 1837 to the effect that the master of a vessel bound to or from a port situate upon waters which are the boundery between two States, might employ a pilot licensed by either State

Jos. S. Rowland *vs.* The "South Cambria." (Dis. Cr. U. S. for district of Delaware.)

This act of 1873, and the act of 1866 now under discussion are believed to be the only acts of Congress (except those relating to vessels propelled by steam) of a general nature which have been passed on this subject of pilotage

The exact causes which led to the passage of the act of 1866 (Rev. Statutes sec. 4237) are not as apparent as in the case of the act of 1837, relating to waters which are the boundaries between neighboring States, but, it is submitted that a careful consideration of the conditions (geographical and local to the particular States) will point us as clearly to the purpose of the act of 1866 (Rev. Statutes, 4237) as if we could point out some specific cause for its enactment.

Let us remember at the outset, and carry with us throughout this discussion, that section 4237 of the Rev. Statutes in *terms* relates to discrimination between *vessels* piloting between certain ports, and against *vessels* propelled wholly or in part by steam and national *vessels.* Already, before the passage of the act of 1866, the Constitution itself, by a self acting provision had provided against discriminations, by State laws between *ports.*

The 6th clause of section 15, of art. I, of the Constitution provides that

"No preference shall be given by any regulation of commerce or revenue, to the ports of one State over those of another etc."

Thus prohibiting by constitutional provision the passage of any law by Congress, or by the several States, giving a preference to the *ports* of one State over those of another State. This constitutional prohibition of laws giving preference to the *ports* of one State over those of another, needed no assistance from congressional action.

It was the fundamental law of the land. And any law, State or Federal, contravening its provisions would, upon proof of that effect, be declared by the courts to be unconstitutional and *and* invalid.

No State law, therefore, could successfully attempt to discriminate in favor of the *ports* of its own State as such under the guise of pilotage laws, or regulations. There was, then, no call for any act of Congress prohibiting the passage of laws giving preference to the *ports* of one State over those of another.

The imposition of pilotage charges for entering or leaving a port does not constitute a preference to, but rather a burden upon, the particular port; and the failure to impose similar pilotage charges upon vessels entering and leaving other ports of the same State had been held not to constitute giving the prohibited preference to such other ports; tho' it might result in a certain inequality between the *ports* of the same State.

This seems clearly the result of the decision in Cooley *vs.* Port Wardens, etc., (*ubi supra*), where the statute construed imposed pilotage charges upon vessels entering and leaving the port of Philadelphia and expressly exempted from such charges vessels entering and leaving the ports "within the River Delaware." The court, holding that this law was not in conflict with the constitutional provision above quoted.

If, as was suggested by counsel for the plaintiff in the argument below, it was the decision of this case in 1851 which led to the passage of the act of 1866 (Rev. Statutes 4237) it would have been easy enough for Congress to have enacted that no State should pass any law imposing pilotage charges upon vessels entering and leaving one of its ports, without imposing similar charges upon vessels entering and leaving the other ports of such State. But Congress did not do so, and we contend that it is fair to assume that Congress realized, as the framers of the Constitution had, that the subject of pilotage is largely local, and is likely to be best provided for, "not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits" (Cooley *vs.* Port Wardens *ubi supra*); and that the legislature of a particular State was the best judge as to whether the geographical situation, the local conditions, the depth of water, sinuosity of channel, existence of bars, or other peculiarities of a particular port rendered it necessary to the safety of vessels entering such port that they should take pilots, and pay the stipulated charges, while the absence of similar local conditions made it unnecessary to impose similar pilotage charges
7 upon vessels entering and leaving other ports in the same State. As has been said, pilotage laws, if not made necessary by local conditions, are rather a burden than an advantage to a port; and the history of compulsory pilotage throughout the world will show that it has been adopted by commercial nations as the choice of the lesser evil, as compared with frequent salvage; and

the question whether the local conditions of one port require their imposition, while those of another port in the same State do not, would seem to be best left to the discretion of the legislature of the particular State.

We contend, therefore, that the act of 1866 (Rev. Statutes) was not passed because of, not intended to reverse, the decision of Cooley *vs.* Port Wardens, etc., and that, under that decision, the exemption of vessels going to certain ports in a State from the pilotage imposed upon vessels going to certain other ports in the same State does not constitute such a preference to the exempted ports as is prohibited by the Constitution of the United States, or by the act of 1866 (4237 Rev. Statutes).

It is at least worthy of note that this has been the universal construction of the law on this subject followed by the legislatures of the various States in framing their pilotage laws. In every case the States have exempted certain ports, either expressly or by failure to impose pilotage, from these charges while imposing them upon certain other enumerated ports.

New York, for instance, imposes pilotage upon vessels entering the port of New York by way of Sandy Hook, but not upon vessels entering the ports on the Hudson river.

Pennsylvania, upon vessels entering the port of Philadelphia but expressly exempts ports "within the River Delaware." Other States make similar express or implied exemptions.

The act of 1866 (4237 Rev. Statutes) was passed nearly 40 years ago, and all these State pilotage laws have been enacted, or amended since that time, and never until now does it seem to have been considered that the act of 1866 required the imposition of pilotage charges as to all of the ports of the State, alike.

Equality of commercial rights between the States, and freedom from State interference therein, was the fundamental idea of the constitutional provisions on this subject. The framers of the Constitution saw that this equality might be destroyed by acts of Congress, or State laws; giving "preference to the ports of one State over those of another State" and provided against this by *constitutional* enactment. When therefore, the Congress of 1866 met, it found that this equality of commercial rights between the States had been secured by the Constitution so far as the giving a "preference to the port of one State over those of another State" would disturb such equality of commercial relations. It found also,
8 if it considered it at all, that it had been held (Cooley *vs.* Wardens, *ubi supra*) that the imposition by State law of pilotage charges as to one of the ports of the State and not as to other ports of the same State, did not violate this constitutional provision. Such a law might bring about a certain inequality between the ports of the same State, but did not give a preference to the ports of such State over those of any other State.

It was still possible, however, that "that equality of commercial rights, and that freedom from State interference, which those who

formed the Constitution were so anxious to secure," might be affected by the passage *of* State legislatures of pilotage laws, or regulations imposing burdens upon *vessels* of a certain character trading to their ports, not imposed upon all *vessels* alike. Such statutes might be so framed as to operate in imposing burdens upon *vessels* trading between foreign ports, or the ports of other States and the ports of the particular State, not imposed upon *vessels* plying between the ports of such State. These laws would result in a disturbance of that "commercial equality" between the States so much desired, and in that "State interference" so much feared by the framers of our Constitution. But this result would be reached, however, by discriminations against *vessels* engaged in certain voyages, and not by giving any preference to the State *ports*, as such.

Such pilotage laws might be made to operate to the benefit of the commerce of one State, and to the injury of the commerce of other States. While, therefore, it was apparent that a certain inequality, in respect to pilotage laws, between the ports of the same State might be necessary, yet it was equally apparent that States should be forced to treat all *vessels, performing the same voyage*, alike. And this we think was the purpose, and should be the construction, of the act of 1866 (4237 Rev. Statutes).

It was passed evidently as another step in preserving equality of commercial rights between the States. It seeks to do this by prohibiting *discrimination*, in the matter of pilotage charges, between certain *vessels*. Now, it is submitted, that there can be no such thing as a discrimination between two parties unless it be in respect to the same act, or the attempted exercise of the same right, because, otherwise, there is no standard of comparison to determine whether there is a discrimination. If one person is *permitted* to do one act, and another person is *forbidden* to do *another, and entirely different, act*, there cannot be said to be a *discrimination* made between the two persons. You must put them in the same position and then deal differently with them in relation to that position, before there can be a discrimination between them. Therefore, we say, that when the act of 1866 prohibits discrimination between certain *ves-*
9 *sels* in respect to pilotage charges, it must mean between those *vessels* in the same situation—*i. e.*, making the same voyage.

To accomplish this end, it seems to us, Congress undertook in this act of 1866 to classify vessels and not ports, in providing for this equality of treatment by the State laws. Pursuing this idea the act makes four classifications:

(*a.*) Vessels plying between the ports of one State are dealt with as a class;

(*b.*) Vessels plying between the ports of one State and the ports of another State, constitute another class;

(*c.*) Vessels propelled in whole or in part by steam, constitute a third class;

(*d.*) National vessels constitute a fourth class.

Between these various classes of *vessels*, the act provides that there shall be no discrimination in the rates of pilotage, or half pilotage. But it is inconceivable that Congress should have intended to make the rates of pilotage the same in all cases, irrespective of the distance, duration or difficulty of the services performed by the pilot—as for instance, to impose the same rate of pilotage upon vessels going from Norfolk to Newport News, or from Newport News to Yorktown, as upon vessels boarded by the pilot outside of the capes of Virginia and piloted to the ports of Norfolk, Newport News or Yorktown. If this could be the construction of the act, the logical result would be that a vessel having come into the port of Norfolk with a cargo, after having paid pilotage to Norfolk, and having discharged her cargo at Norfolk, and going to seek a cargo at Newport News, would have to pay the same pilotage for entering and leaving the port of Newport News as it paid for the original entry to the port of Norfolk; and this burden would be multiplied by the number of ports within the State of Virginia, to which she would have to go to take a complete cargo for her outward trip. The act of 1866 would, by this construction, impose an intolerable burden upon commerce, rather than simply secure equality of treatment between these various classes of vessels when engaged in the same voyages. But if, as we contend *under* the act of 1866 was intended only to secure equality of treatment under the pilotage laws between these various classes of vessels as such when performing the same voyages, the construction imposes no onerous burdens upon commerce, but tends to the preservation of "that equality of commercial *the* rights and freedom from States interference," in the commerce between the States which seems to have been so earnestly desired by the framers of our Constitution.

The statutes of Virginia are not in conflict with this construction of the act of 1866. Every vessel entering the capes of Virginia bound for the designated ports, whether the vessel belongs to the first class enumerated in the statute, viz:—sailing between the ports of the State, or to the second class -numerated in the statute viz:—sailing between the ports of another State and the ports of this State, pays the same rate of pilotage. And any vessels sailing from the port of another State, having entered one of the ports designated in the Virginia statutes, may sail between that port and any other of the ports of the State of Virginia (just as vessels habitually sailing between the ports of Virginia) without the payment of any pilotage.

We are pointed to the cases of Spraigue *vs.* Thompson, 118 U. S. Rep. 90 and Freeman *vs.* The Undaunted, 37 Fed. Rep. p. 622, as sustaining a construction of the act of 1866 at variance with the construction contended for by us. We contend that a careful consideration of these cases, and of the State laws which they construe, will show that these decisions are entirely consisted with construction of the act of 1866, for which we contend.

The statute of Georgia, which is construed by the court in the case of Spriague *vs.* Thompson, provides as follows:—

"Any person, master, or commander of a vessel bearing toward any of the ports or harbors of this State, except *coasters in this State, and between the ports of this State and those of South Carolina and between the ports of this State and those of Florida*, who refuses to receive a pilot on board, shall be liable, on his arrival at such ports in this State, to pay the first pilot who may have offered his services outside the bar, * * *, the full rates of pilotage established by law for such vessels."

Sections 2466 and 2468 of the Political Code of California, which are construed in the case of Freeman *vs.* The Undaunted, after imposing half pilotage on vessels when a pilot is declined exempts "from all charges for pilotage, unless a pilot be actually employed, a vessel "coasting between San Francisco and any port in Oregon or in Washington or Alaska Territories, and all vessels "*coasting*" between the ports of this State."

It will be observed that in both of these cases, the statutes under construction exempted, as a class, vessels "*coasting* between the ports of this (such) State."

But pilotage charges (or half pilotage charges) are, by the laws of those States, imposed upon all vessels entering the ports of those States except those vessels which are "*coasters*," or "*coasting*"
11 between the ports "of such States—in other words, upon vessels sailing between the ports of another State, and the ports of the said State: *i. e.* upon the vessels of the second class enumerated in the act of 1866.

Th-se decisions seems to us, therefore, to consider the act of 1866 as classifying vessels as we have above classified them, and determin-g that no discrimination in the rates of pilotage shall be made between these classes of vessel-, as such; and that the acts of the States of Georgia and California do make such a discrimination between those classes of vessels.

"Coaster" is defined as "a vessel *engage-* in the coasting trade; and "coasting" as "the practice of sailing along a coast, as for trading."

Standard Dictionary.

These definitions are, it is contended, the same as the accepted meaning of these words in shipping, or maritime circles. A "coas-er" is a vessel habitually engaged in the coasting trade. A vessel "coasting between certain ports, is a vessel habitually engaged in the coasting trade between such ports. Both terms define the class of vessels by their habitual voyages. Under the laws of the States of Georgia and of California, only this class of vessels, viz.:—"coasters," or "coasting" between ports of the State, are exempted from the pilotage charges? A vessel sailing from the port of another State, (say Maine) to the ports of Georgia or of California, having arrived at a port in either State, and desiring to sail for another port in the same State, would not be considered, in the common acceptation of the term, a "coaster" between the ports of the

State of Georgia, or between the ports of the State of California, and would not be entitled, under the laws of those States, to the same exemption from pilotage charges which is accorded by those laws to vessels habitually engaged in the coasting trade between the ports of each of said States.

Thus, it seems to us, that these two cases confirm our construction of the classification of vessel- under the act of 1866, and furnished flagrant examples of a discrimination in pilotage rates between such classes of vessels, which is intended to be prohibited by the said act. No such discrimination is made by the statutes of Virginia other facts existing in each of those cases might be pointed out to distinguish them from the case at bar, and to show the propriety of the decision of the courts in those cases, without necessarily involving the determination of the particular point under discussion here.

To recapitulate briefly: Our contention is, that the act of
12 1866 (sec. 4237 Rev. Sts.) is intended to secure equality of treatment, in respect to pilotage charges, of all vessels of the several classes enumerated in the said act, when engaged upon the same voyage.

We respectfully submit the foregoing as our answer to the 1st and 2nd grounds assigned for the defendant's demurrer to the plaintiff's amended declaration, and for answer to the other assigned grounds of demurrer we submit the following:

The 3rd ground assigned for the demurrer, is that the Virginia statutes violate that provision of the Constitution of the United — which declares that the "citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." To this we reply that there is no provision in the Virginia statutes which gives to the citizens of that State any privilege or immunity not enjoyed by the citizens of the several States, except that no one, *not a citizen of Virginia*, can become a licensed pilot. This provision, we submit, does not contravene the constitutional declaration above referred to.

What are the privileges and immunities of citizens in the several States may be difficult to determine in any given case. We find in a leading case on this subject that "the right of a citizen of one State to pass through, or reside in, any other State for the purposes of trade, agriculture, professional pursuits, or otherwise," enumerated as some of these privileges and immunities.

Corfield *vs.* Corell, 4 Wash. (U. S. Cir. Ct. Rep.) 371, 380.

In another well considered case we find it said that they "do not mean the right of election, of being elected, or of holding offices."

Campbell *vs.* Morris, 3 Har. & McH. (Md.) 554.

If a State has the right to say that none but citizens shall vote, it would seem to follow that it has the right to say that none but those entitled to vote shall hold office in the State; and we submit

that it is not going too far to claim that a pilot licensed under the Virginia statutes is a State officer.

He is examined and licensed by a board of commissioners, appointed by designated courts of the State for that purpose. He must first apply to the proper court for a certificate of his eligibility for examination and license, and is required to give a bond for the performance of his duties. The performance of his duties is obligatory; and, in respect to quarantine, he has imposed upon him some of the duties of a health officer.

13 In view of the importance of his duties to the commercial interests of the State, of the necessity of his being a person of sobriety and intelligence, and of his having an intimate knowledge of the waters of the State, it is reasonable that the State should impose upon him an official relation to the State; and we contend that the statutes have done this—at least to the extent of differentiating his duties from those "fundamental" privileges which the Constitution provides shall be common to the citizens of the several States.

But, if we should be wrong about this, what is the result? Only to declare this prerequisite to eligibility to be void, which would not at all destroy the purposes, or affect the efficiency of this system of laws regulating pilotage in the waters of the State of Virginia.

The 4th ground of the demurrer: that the Virginia statutes are repugnant to that provision of the Constitution of the United States which prohibits any State from making or passing "any law which will abridge the privileges or immunities of citizens of the United States"—is so closely to the third ground of demurrer, that the preceding views, if sound as applied to the third ground of demurrer, are a complete answer to the 4th, also.

To the 5th. ground of demurrer:—that the Virginia statutes are in conflict with section 4236 U. S. Revised Statutes, which provides that "the master of any vessel coming into or going out of, any port situated upon waters which are the boundary between the two States, may employ any pilot licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port"—we say, that no one of the ports of entry or departure as to which our statute requires a vessel to employ a Virginia pilot, is situate upon waters which are the boundary between two States, they are all upon waters which are entirely intra-Virginia waters. This is a fact, of which the court will take judicial cognizance, and will appear by a comparison of the statute with the map of the State.

The 6th ground of demurrer:—that the State law violates the "inter-state commerce" provision of the Constitution—has been settled adversely to the defendant by the case of Cooley *vs.* Wardens *ubi supra.*

The 7th. ground of demurrer was not insisted on in the argument in the lower court, and is believed to have been abandoned by the defendant.

For these reasons we confidently contend that the lower
14 court erred in its judgment aforesaid, sustaining the defendant's demurrer to the plaintiff's amended declaration aforesaid, and giving judgment to the said defendant upon his said demurrer, and we respectfully pray that the said judgment may be review- and reversed.

The importance of the questions involved in this case—not only to the plaintiff and the Virginia Pilots' Association, but to the commerce of the entire State—involving, as they do, the existence of an entire system of State laws, is so great that the petitioner here gives notice that, if a writ of error be awarded him, he will, as soon as possible, under the rules of this court, apply to have this case put upon the privileged docket of the court, so as to have as speedy a trial as possible.

Respectfully submitted.

JOSEPH J. DARDEN.

By R. C. MARSHALL,
BROOKE & ELLIOTT,
JNO. W. DANIEL, *p. q.*,
His Attorneys.

I hereby certify that the judgment hereinabove complained of should, in my opinion, be reviewed by this honorable court.

D. TUCKER BROOKE,
Attorney Practicing in the Supreme Court of Appeals of Virginia.

Writ of error awarded. Bond $100.

JAMES KEITH.

February 27, 1903.

To the clerk of the supreme court of appeals of Virginia, at Richmond.

15 VIRGINIA:

Pleas before the court of law and chancery of the city of Norfolk at the courthouse of said city on Thursday, the 12th day of February, 1903.

Be it remembered that heretofore to-wit: at rules held in the clerk's office of said court on the first Monday in September, 1902, came Joseph J. Darden, pilot, by his attorneys, and filed his declaration in the words and figures following:

(Declaration omitted by direction of counsel.)

Whereupon the defendant being summoned and failing to appear; a conditional judgment was entered against him.

And afterwards: at rules held in said office on the second Monday in September, 1903, came again the plaintiff by his attorneys and the defendant still failing to appear, the conditional judgment was confirmed and a writ of enquiry awarded.

And afterwards, to-wit: in the court of law and chancery of the city of Norfolk on the first day of October, 1902.

JOSEPH J. DARDEN (Pilot)
vs.
A. P. THOMSON (Master, &c.).

In assumpsit and on an attachment.

This day came the plaintiff by his attorney and the defendant appeared by Hughes and Little, his attorneys, and thereupon the said defendant filed his demurrer to the plaintiff's declaration and to each count thereof, and his plea of non-assumpsit, and the plaintiff joined in said demurrer and replied generally to the said plea. Whereupon it is ordered that the judgment entered herein at rules be set aside.

(Copies of demurrer and pleas omitted by direction of counsel.)

And afterwards—in said court on the 11th day of October, 1902.

This day came again the parties by their attorneys and the defendant's demurrer to plaintiff's declaration being argued is
16 sustained. And on motion of the plaintiff leave is granted him to file an amended declaration in this case.

And afterwards—in said court on the 17th day of November, 1902.

This day came again the parties by their attorneys and thereupon the plaintiff filed his amended declaration and the defendant filed his demurrer thereto and pleaded non-assumpsit and the plaintiff joined in said demurrer and replied generally to said plea.

Amended Declaration.

In the Court of Law Chancery of the City of Norfolk, Virginia.

JOSEPH J. DARDEN
vs.
A. P. THOMPSON.

Joseph J. Darden, (pilot) plaintiff, complains of A. P. Thompson, master of the schooner "Wm. Neely," defendant, said schooner at the time of the acts complained of belonging to residents and citizens of the State of Maine, and engaged in the coastwise trade be-

tween Virginia and New England and not holding a coastwise pilot license, of a plea of trespass on the case in assumpsit, for that whereas on the 1st day of August, 1902, the said plaintiff was a pilot duly licensed under the laws of the State of Virginia, and on said date offered his services as such licensed pilot to the said A. P. Thompson, master of the said schooner, Cape Henry bearing west of south, from sea to Norfolk city, Virginia, whither she was bound, and then and there the proffer of the said pilot's services was refused and demand was then and there made by the plaintiff upon the said master of the said schooner for the value of the said services in the sum of $87.75, pilotage, which demand was then and there refused by the said master of the said schooner; that the said master of the said schooner has failed to deposit and refused to deposit with some responsible person to the order of the said plaintiff the said sum of $87.75 for pilotage aforesaid; nevertheless, the said defendant, not regarding his said promise and undertaking, has not, although thereunto often requested, as yet paid to the said plaintiff the said — of money, or any part thereof, but so
17 to do hath hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the plaintiff $175.00, and therefore he brings his suit, &c.

R. C. MARSHALL,
D. TUCKER BROOKE, *p. q.*

Demurrer.

In the Court of Law and Chancery of the City of Norfolk, Virginia.

A. P. THOMPSON
ads.
JOSEPH J. DARDEN.

Demurrer.

The defendant, by his attorneys, comes and says that the declaration is not sufficient in law, and for cause of demurrer assigns that the statute of the State of Virginia respecting pilotage, on which said declaration is based, is unconstitutional and void and in conflict with the laws of the United States in the following particulars:

1. It is in conflict with section ten article 1 of the United States Constitution wherein it is provided that:

"No preference shall be given by any regulations of commerce or revenue to the ports of one State over those of another."

2. It is in conflict with section 4237 of the United States Revised Statutes, which provides:

"No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State

and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

3. It is in conflict with article 4, section 2, paragraph one of the United States Constitution wherein it is provided that the
18 citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.

4. It is in conflict with section one of the fourteenth amendment to the United States Constitution, which provides that no State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States.

5. It is in conflict with section 4236 of the United States Revised Statutes which provides as follows:

"The master of any vessel coming into or going out of any port situate upon waters which are the bound-ry between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port."

6. It is in conflict with article one, section 8 paragraph 3 of the United States Constitution, which provides that Congress shall regulate the commerce among the several States and with foreign nations, and that no State shall lay any duty on tonnage.

7. It is in conflict with the act of December 1, 1898, respecting licensed officers on sailing vessels of over 700 tons.

HUGHES & LITTLE, *p. d.*

And afterwards: in said court on the 31st day of January, 1903.

This day came again the parties by their attorneys and the defendant's demurrer to plaintiff's amended declaration being argued is sustained.

And now at this day to-wit: in the court of law and chancery of the city of Norfolk on the 12th day of February, 1903.

JOSEPH J. DARDEN (Pilot), Plaintiff,
vs.
A. P. THOMPSON, Master of the Schooner "Wm. Neeley," Def'd'nt.

In assumpsit.

This day came again the parties by their attorneys and the court having heretofore sustained the defendant's demurrer to the
19 plaintiff's amended declaration. It is therefore considered by the court that the plaintiff take nothing by his bill but for his false clamor be, in mercy, &c., and that the defendant go

thereof without day and recover against the plaintiff his costs by him about his defence in this behalf expended.

To which ruling and judgment of the court, sustaining said demurrer and entering judgment for the defendant, the plaintiff excepts.

VIRGINIA:

In the clerk's office of the court of law and chancery of the city of Norfolk, on the 16th day of February, 1903.

I, James V. Trehy, clerk of the said court of law and chancery of the city of Norfolk, do hereby certify that the foregoing and annexed is a true transcript of the record in the suit of Joseph J. Darden, (pilot) plaintiff, against A. P. Thompson, master of the schooner "Wm. Neely," defendant, lately pending in said court.

I further certify that said copy was not made up and completed until the defendant had had due notice of the making of the same, and the intention of the plaintiff to take an appeal therein.

Given under my hand this 16th day of February, 1903.

JAMES V. TREHY, *Clerk.*

Fee for this record :—$3.00.

It is agreed that the above transcript contains all that is necessary for the proper decision of this case in the appellate court.

R. C. MARSHALL, BROOKE & ELLIOTT, *p. q.*
HUGHES & LITTLE, *p. d.*

A copy—
Teste: GEO. K. TAYLOR, *C. C.*

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21 To the honorable judges of the supreme court of appeals of Virginia:

The defendant, Abram P. Thompson, by which name as well as by the name of A. P. Thompson, he is called and known, represents that he is aggrieved by a final judgment of the court of law and

chancery of the city of Norfolk in a suit wherein Joseph J. Darden, pilot, was plaintiff, and the said petitioner was defendant, the said judgment having been entered in said court on the 29th day of October, A. D. 1903. A transcript of the record since this same case was last before this court is hereto attached, from which, in conjunction with the previous part of the record already on file in this court, it will appear that Joseph J. Darden brought an action of assumpsit at common law against this petitioner for a tender of pilotage service, as will more fully appear by the declaration in the cause. This defendant demurred to the declaration on the grounds set out in said demurrer, which set up that the pilot law of the State of Virginia was in conflict with the Constitution of the United States. The demurrer was sustained in the court of law and chancery, and thereupon the said Joseph J. Darden took this case by a writ of error and supersedeas to this court. On the 19th day of June, A. D. 1903, your honors reversed the decision of the court of law and chancery, and held that the said pilot law was not in conflict with the Constitution of the United States, and remanded the case with instructions to the lower court to over-rule the demurrer and for further proceedings not in conflict with the opinion of this court filed in the record. The said order of this
22 court and opinion are set out in the record hereto attached.

Thereupon the case came on for trial again in the court of law and chancery, and resulted in a verdict for plaintiff. This defendant thereupon moved an arrest of judgment, raising the same questions of constitutionality, but the court over-ruled the said motion in arrest of judgment and entered a verdict for plaintiff. The petitioner alleges that the court erred in holding the law to be constitutional and in refusing to give the instruction asked for by defendant and set out in his bill of exceptions, and in overruling his motion in arrest of judgment.

Wherefore the petitioner prays that this court would issue a writ of error to the said judgment and that the same be reviewed and reversed.

ABRAM P. THOMPSON,
By ROB'T M. HUGHES,
His Attorney.

I, Robert M. Hughes, an attorney at law practicing in the supreme court of appeals of Virginia, certify that there is sufficient matter of error in the record accompanying this petition to render it proper that the same be reviewed.

ROB'T M. HUGHES.

23 VIRGINIA:

Pleas before the court of law and chancery of the city of Norfolk, at the court house of said city, on Monday, the 9th day of November, 1903.

Be it remembered that heretofore, to-wit: in the court of law and chancery of the city of Norfolk on the 16th day of July, 1903. The following judgment of the supreme court of appeals was this day received and is here entered as the judgment of this court, viz:

"VIRGINIA:

"In the Supreme Court of Appeals Held at the Court-house of Wythe "County, in the Town of Wytheville, on Thursday, the 18th Day "of June, 1903.

"JOSEPH J. DARDEN, Pilot, Plaintiff in Error,
"*against*
"A. P. THOMPSON, Master of the "Schooner Wm. Neely, Defendant in Error.

Upon a Writ of Error to a Judgment Rendered by the Court of Law and Chancery of the City of Norfolk on the 12th Day of February, 1903.

"This day came again the parties by counsel and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel is of opinion, for reasons stated in writing and filed with the record, that the plaintiff's declaration stated a good cause of action; and that the trial court erred in sustaining the demurrer thereto.

"It is therefore adjudged, ordered and decreed that the judgment aforesaid be reversed and annulled, the demurrer overruled, and that this cause be remanded to the said court of law and chancery of the city of Norfolk with leave to the defendant to plead if he "be so advised and for further proceeding to be had therein
24 "not in conflict with the views expressed in this court's opin-"ion. And it is further ordered that the plaintiff in error recover of the defendant in error his costs by him in this behalf herein expended. Which is ordered to be certified to the said court of law and chancery of the city of Norfolk.

"A copy.

"Teste:—

"J. M. KELLY, *Clerk.*

"*Plaintiff in Error's Costs.*

"Clerk's fees, printing and writ tax.....	$37.05
"Transcript.....	3.00
	"$40.05

"Teste:— J. M. KELLY, *Clerk.*"

And thereupon it is ordered that said case be reinstated on the docket of this court for further proceedings to be had therein.

Opinion of Court.

DARDEN, Pilot,
vs.
THOMPSON, Master Schooner "Wm. Neely."

Opinion by Judge John A. Buchanan;
Wytheville, Va., June 18, 1903.

Corporation Court, City of Norfolk.

The plaintiff in error, who was the plaintiff in the trial court, filed his declaration which was afterwards amended, in which he averred that he was a licensed pilot under the laws of this State; that on the 1st day of August, 1902, off Cape Henry he offered his services as pilot to the defendant, the master of the "Wm. Neely," a schooner belonging to residents and citizens of Maine and engaged in coastwise trade between Virginia and New England, (and not
25 holding a coastwise pilot license) which was making her way at that time from the sea near Cape Henry to Norfolk, Virginia, whither she was bound; that his services were declined; that demand was then and there made upon the defendant for their value, to-wit, $87.75, which demand was refused by the defendant who refused and still refuses to pay or deposit the same as required by the statute in such case made and provided, and that by reasons of the premises a right of action has accrued to the plaintiff to recover the said sum.

The defendant's demurrer to the declaration was sustained and final judgment rendered in his favor. To that judgment this writ of error was awarded.

Whilst a number of grounds of demurrer, was assigned, only one was considered by the trial court and only one is relied on here, and that is, that the pilot laws of Virginia upon which the declaration is based are inoperative and void, because in conflict with section 4237 of the Revised Statutes of the United States, which provides that "No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam or against national vessels of the United States; and all existing regulartions or provisions making any such discriminations are annulled and abrogated." The sections of the Virginia statute upon which this action is based are as follows:

"1965. The master of every vessel (other than a coasting vessel having a pilot license), inward bound from sea, shall take the first Virginia pilot that offers his services, Cape Henry bearing west of

south to Smith's point, Yorktown, Newport News, or Norfolk, or any intermediate points; and any such vessel, outward bound,
26 shall take the first pilot that offers his services at Smith's point, Yorktown, Newport News, or Norfolk, or any intermediate point, to sea; and any master, refusing to do so, shall immediately pay to the said pilot full pilotage from the sea to Newport News, Smith's point, Yorktown, or Norfolk, or from said ports to sea, as the case may be; but no master of a vessel coming from sea shall be compelled to take a pilot after arriving within the line at which Cape Henry bears west of south; provided however, that any registered vessel arriving within the line of Cape Henry, bearing west of south, without having taken a pilot, bound for Norfolk, Newport News, or Richmond, shall not be liable for pilotage; but the master may pilot his own vessel to Hampton Roads, and there employ any steamboat or tow-boat to tow his vessel to her port of *of* destination; provided, that in no instance shall any master be allowed to employ any steamboat or towboat below Hampton Roads without paying full pilotage to the first regular pilot that offers his services to said vessel; and any master so employing a steamboat or towboat below Hampton Roads without a pilot on board of such vessel, when one shall have offered his services, shall be liable to the penalty prescribed in section nineteen hundred and sixty three. This provision shall apply only to inward bound vessels."

"1969. Pilots shall have pilotage at the following rates: For every vessel owned by a citizen of the United States, and for every vessel owned by a citizen or subject of any foreign State, whose vessels are by treaty placed on the same footing as vessels of the United States, if the vessel be spoken or boarded to the eastward of Cape Henry, there shall be paid for each foot the vessel draws, as follows: From sea to Smith's point, West point, Newport News, Norfolk or any place between Smith's point, West point, Newport News, or Norfolk, vessels drawing ten feet and under, two dollars and fifty cents; vessels drawing thirteen feet and over ten feet, three dollars; vessels draw-
27 ing fourteen feet and over thirteen feet, three dollars and fifty cents; vessels drawing sixteen feet and over fourteen feet, four dollars; vessels drawing over sixteen feet, four dollars and fifty cents. If the vessel be board- or spoken twenty miles or more eastward of Cape Henry, twenty five cents per foot shall be added to the foregoing rates. There shall be paid the same pilotage from Smith's point, West point, Newport News, or Norfolk, or any intermediate point to sea, as from sea to those places; and from Newport News to Jamestown, or any place between Newport News and Jamestown, one dollar and thirty-five cents per foot; from Newport News to Richmond, or any plave between Jamestown and Richmond, two dollars and fifty cents per foot; and the same rates of pilotage shall be paid from said places, respectively, down. Vessels coming from sea to Hampton Roads and thence to any port

in Maryland, shall be subject to the same rate of pilotage as vessels bound from Newport News to sea. All vessels coming to Hampton Roads, seeking, in ballast, shall only pay one half pilotage in and one-half out; provided however, that if such vessel coming into Hampton Roads seeking, is afterwards chartered to load in any port or place in this State, she shall pay the usual pilotage in and out as though she had come to a direct port. All steamers calling in any port or place in this State for the sole purpose of coaling shall only pay one-half pilotage in and one-half pilotage out. All vessels that go from Norfolk to Newport News to load or finish loading, and all vessels that go from Newport News to Norfolk to load or finishing loading, shall, if they take a pilot (which shall be optional with the master), pay a fee of ten dollars to the pilot for transporting any such vessel to or from either place."

By the provisions of the sections of the Code quoted all vessels (except coastwise vessels with a pilot license) inward bound from the sea to Smith's point, Yorktown, Newport News or Norfolk, or any intermediate point, and all such vessels outward bound to the sea from Smith's point, Yorktown, Newport News or Norfolk, or any intermediate point, are subject to the compulsory regulation and rates therein provided. All vessels are subject to the same regulations and under the same circumstances and conditions are required to pay the same fees.

There is clearly nothing in those statutes which expressly make any discrimination between such vessels. But the contention of the defendant is, that our pilotage system violates section 4237 of the Revised Statutes since it imposes no pilotage rates between Virginia ports, nor between Virginia ports and Maryland ports which can be reached without going to sea, nor upon vessels bound to or from any point upon the Potomac river, thereby throwing the whole burden of keeping up the compulsory pilotage system upon interstate, and not upon both internal and interstate commerce as was intended by section 4237.

That contention raises the question whether or not a State can establish a compulsory system of pilotage as to vessels coming from the sea into her inland ports and as to vessels going from her inland ports to the sea without also establishing a compulsory system of pilotage as to vessels trading between her inland ports respectively or between her inland ports and the ports of another State which can be reached without going to sea. If she cannot, then a State may be compelled to burden commerce with a pilot system upon her inland waters where such a system is not needed in order that she may establish the system where it is absolutely necessary for the protection of life and property. That she is not required to do this is plain, we think, from the nature of the subject and from the declarations of Congress and the Supreme Court of the United States on the subject.

By an act of Congress August 7, 1789, sec. 4, it was declared "That all pilots in the bays inlets, rivers, harbors and ports of the

United States, shall continue to be regulated in conformity with the existing laws of the States respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose until further legislative provision shall be made by Congress."

In the case of Cooley *v.* Board of Wardens of the Port of Philadelphia, 12 How. 299, 319, it was said that the power to regulate commerce embraces a vast field containing not only many but exceedingly various subjects quite unlike in their nature; some imperatively demanding a single uniform rule operating equally upon the commerce of the United States in every port, and some like the subject (pilotage) now in question as imperatively demanding that diversity, which alone can meet the local necessities of navigation. * * * The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of the subject is such that until Congress should find it necessary to exert its powers it should be left to the legislation of the States; that it is local and not national; that it is likely to be best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits. The practice of the States and of the National Government has been in conformity with this declaration from the origin of the National Government until this time (1851); and the nature of the object when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity of different systems of regulations, drawn from local knowledge and experience and conformed to local wants."

The decision from which we have quoted was made prior to the enactment of section 4237 of the Revised Statutes, but in the subsequent case of *In re* Alexander McNiel, 13 Wall., 236, 242, that section and the prior acts of Congress on the subject of pilotage are referred to and the decision in the case of Cooley *v.* Board of Wardens approved. In following that case the court said: "We are entirely satisfied with that adjudication and to reaffirm the doctrine which it lays down."

None of the decisions of the Supreme Court to which we have referred indicate any change in the views of that court that pilotage "is local and not national; that it is likely to be best provided for not by one system or plan of regulations, but by as many as the legislatures of the several States should deem applicable to the local peculiarities of the ports within their limits."

None of them seem to us to indicate that the effect of section 4237 of the Revised Statutes was to require a State, if it legislated at all upon the subject, to enact an uniform system of pilot regulations operating alike upon all her ports, without regard to their local peculiarities or necessities.

The State statute which was held in Sprague *v.* Thompsin, 118 U. S., 90, to be in conflict with section 4237 of the Revised Statutes

expressly excepted from its operation the coasting vessels of the State of Georgia and the vessels trading between the ports of that State and the ports of South Carolina and Florida when but for the exception in the statute such vessels would have been subject to the same compulsory pilotage regulations. Under precisely the
31 same circumstances and conditions pilot fees were required from vessels coming from ports other than those of Georgia, South Carolina and Florida—whilst the vessels of thos- three States were exempted therefrom.

The sections of the Virginia statute in question do not exempt vessels trading between the inland ports of Virginia or vessels trading between the inland ports of Virginia and the ports of Maryland which can be reached without going to sea. Such vessels do not come within the operation of the compulsory pilot laws of the State, because they do not pass through the capes. There is no discrimination in their favor unless, as before said, the State cannot have compulsory pilot regulations as to vessels coming into her inland ports from the sea and going from those ports to the sea without also having a compulsory pilot system as to vessels trading between her inland ports respectively and between such ports and the ports of Maryland which can be reached without going to sea.

Neither, in our opinion, does section 1990 of the Code, which provides that no vessle bound to or from any point on the Potomac river shall be required to pay pilotage conflict with the act of Congress (sec. 4237) That section was probably enacted for the purpose of conforming our pilot regulations to the congressional provisions now found in section 4236 of the Revised Statutes, which provides "that the master of any vessel coming into or going out of any port situate upon the waters which are the boundary between two States may employ any pilot duly licensed or authorized by the laws of either of the States bounden on such waters to pilot the vessel to or from such port." But whether it was or not the exemption from the compulsory pilot regulations of the State provided for by it do not make any discrimination as to vessels or ports. All vessels bound to or from any point on the Potomac are exempted, no matter to what points they are bound or from what ports they may come.

32 The pilot regulations of this State, whether compulsory or optional, operate alike upon all vessels under the same circumstances and conditions without regard to the ports from which they come or to which they go.

We are of opinion, therefore, that the pilot regulations of this State upon which the plaintiff's action is based are not in conflict with the acts of Congress upon the subject; that the plaintiff's declaration stated a good cause of action; and that the trial court erred in sustaining the demurrer thereto.

The judgment complained of must be reversed, the demurrer overruled and the cause remanded with leave to the defendant to

plead if he be so advised, and for further proceedings not in conflict with the views expressed in this opinion.

And afterwards in said court on the 29th day of October, 1903.

JOSEPH J. DARDEN (Pilot), Plaintiff,
v.
A. P. THOMPSON, Master of the Schooner "Wm. Neely," Defendant. } In Assumpsit.

This day came again the parties by their attorneys and thereupon by consent of parties came a jury of eleven to-wit: G. Nusbaum, C. T. Townley, James Barkley, George T. Banks, O. T. Baxter, W. W. Alfriend, J. Y. S. Mitchell, Jno. P. Kevill, A. S. Cooper, A. B. Duesberry and F. E. Stinchfield, who being sworn the truth of and upon the premises to speak and having heard the evidence returned a verdict in these words: "1903 Oct. 29, We the jury find for the plaintiff and assess his damages at $87.75 with legal interest thereon from the 1st day of August, 1902." Whereupon the defendant moved the court to set aside the said verdict and grant him a new trial on the grounds; 1st. That the verdict is contrary to the law and the evidence; 2nd. That the court erred in refusing
33 to grant the defendant's instruction; and 3rd. That the damages assessed are excessive, which motion being argued is overruled. And thereupon the defendant moved in arrest of judgment on the ground that chapter 89 of the Virginia Code of 1887 on which the plaintiff bases his right to recover is unconstitutional and void in the following particulars:

1. It is in conflict with section 10 article 1 of the United States Constitution wherein it is provided that: "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." 2. It is in conflict with section 4237 of the United States Revised Statutes which provides: "No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between ports of different States or any discrimination against vessels propelled in whole or in part by steam or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

3. It is in conflict with article 4, section 2 paragraph 1 of the United States Constitution wherein it is provided that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. 4. It is in conflict with section 1 of the fourteenth amendment to the United States Constitution which provides that no State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; and which forbids any State from depriving any person of life, liberty or property without due process of law. 5. It is in conflict with

section 4236 of the United States Revised Statutes which provides as follows; "The master of any vessel coming into or going out of any port situate upon waters which are the boundary be-
34 tween two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters to pilot the vessel to or from such port." 6. It is in conflict with article 1. section 8 paragraph 3 of the United States Constitution which provides that Congress shall regulate the commerce among the several States and with foreign nations and that no State shall lay any duty on tonnage. 7. It is in conflict with the act of December 1, 1898, respecting licensed officers on sailing vessels of over 700 tons:—And the said motion in arrest of judgment being argued is overruled.

Therefore it is considered by the court that the plaintiff recover against the defendant the sum of eighty-seven dollars and seventy-five cents ($87.75) with interest thereon to be computed after the rate of six per centum per annum from the first day of August 1902 according to said verdict until payment and his costs by him about his suit in this behalf expended. And the said defendant in mercy &c.

Memorandum.—Upon the trial of this case the defendant excepted to the ruling of the court refusing to set aside the verdict of the jury and grant him a new trial, and to the ruling of the court overruling his motion in arrest of judgment and also to the judgment entered on said verdict, and leave is given him to file his bill of exceptions at a future day.

And at the instance of the defendant who desires to present a petition for a writ of supersedeas to the foregoing judgment execution thereof is suspended for the period of ninety days from this day when the said defendant or some one for him shall give bond before the clerk of this court in the penalty of $150.00 with good security and with a condition reciting such judgment and the intention of said defendant to present such petition and providing for the payment of all such damages as may accrue to any per-
35 son of the said suspension in case a supersedeas to such judgment shall not be allowed and be effectual in the said period of ninety days.

And now at this day to-wit:

In the Court of Law and Chancery of the City of Norfolk, on the 9th Day of November, 1903.

JOSEPH J. DARDEN, Pilot, Plaintiff,
v.
A. P. THOMPSON, Master, &c., Defendant. } In Assumpsit.

This day came again the parties by their attorneys and thereupon the defendant, in pursuance of the leave heretofore granted, tendered his two bills of exceptions which were received, signed and sealed by the court and ordered to be made a part of the record.

Bills of Exceptions.

36 Be it remembered that on the trial of this cause the defendant moved the court to instruct the jury as follows:

"GENTLEMEN OF THE JURY: If you believe from the evidence in this case that the plaintiff is a licensed pilot, that the defendant was master of the schooner 'William Neely' on the first day of August, 1902, that the said schooner at that time belonged to nonresidents of the State of Virginia and was engaged in the coastwise trade between Virginia and New England and did not hold a pilot license, and that on the said day the plaintiff tendered his services as pilot to the said schooner Cape Henry bearing west of south, as she was bound from sea to Norfolk, that the said services were refused, that the plaintiff subsequent thereto demanded his pilotage fee of the defendant and that said demand was refused, and the defendant did not voluntarily employ the said plaintiff as pilot on his vessel on the day and year aforesaid, you must find for the defendant."

But the court refused to grant the said instruction, to which action of the court the defendant, by counsel, at the time of such ruling, excepted, and tendered this its bill of exceptions which it prays may be signed, sealed and made a part of the record in this case, and the same is done accordingly.

Reference is hereby made to bill of exceptions No. 2 which is by said reference made a part of this bill of exceptions in this cause.

WILLIAM BRUCE MARTIN. [SEAL.]

37 No. 2.

Be it remembered that on the trial of this cause the jury found a verdict in the words and figures following, to-wit:—

"We, the jury, find for the plaintiff and assess his damages at eighty-seven dollars and seventy-five cents, with interest thereon from the first day of August, 1902."

And thereupon the defendant, before judgment was entered upon said verdict, moved the court to set aside the verdict and grant him a new trial on the grounds:

1st. That the verdict was contrary to law and to the evidence adduced before the court at the trial of this cause.

2nd. That the court erred in refusing the defendant's instruction hereinbefore set out in bill of exceptions No. 1, which is hereby referred to as a part of this bill of exceptions.

3rd. That the damages are excessive.

But the court refused to set aside the said verdict and entered judgment thereon for the plaintiff, to which action of the court in refusing

to set aside said verdict and in entering the said judgment the defendant, by counsel, at the time of said action of the court, excepted and tendered this its bill of exceptions which it prays may be signed, sealed and made a part of the record in this case, and the same is done accordingly. And the court certifies the following to be the evidence adduced on the trial of this cause and that it was all the evidence which was adduced:

38 JOSEPH J. DARDEN, being duly sworn, testified as follows:

Capt. MARSHALL:

Q. What is your name?
A. Joseph J. Darden.
Q. What is your occupation, Mr. Darden?
A. Pilot.
Q. Were you, or were you not, a licensed pilot in August 1902?
A. I was.
Q. State the facts so far as the claim made for pilotage is concerned in regard to your speaking the schooner William Neely at that time?
A. I was on the pilot boat Relief, and spoke the schooner William Neely outside of Cape Henry; the captain refused the pilot,
39 and I made a memorandum of it and sent it to Norfolk to my agent, and he presented the bill, and the captain refused to pay it. Afterwards I was sent for to come up, and I swore out an affidavit as to speaking the vessel, and sued the captain or master for the amount of the bill.
Q. Do you recollect what was the amount?
A. Nineteen feet and a half.
Q. The rate allowed by law is how much a foot?
A. Four dollars and a half.
Q. Was the amount $87.75, do you remember?
A. I think so, yes.
Q. Was she coming in or going out?
A. Coming in.
Q. Was she loaded, or not?
A. Loaded deep, bound to Norfolk.

Cross-examination.

Mr. HUGHES:

Q. Do you know the vessel—has she been accustomed to use here, or not?
A. I had seen her once before that time, I think.

Capt. MARSHALL:

Q. She has come in frequently since?
A. Oh, yes. I have seen the captain, and talked to him at Newport News.

Mr. HUGHES:

Q. She is one of the coastwise schooners engaged in trade from here north?
A. Yes, sir.

Judge BROOKE:

Q. She was not licensed?
A. Not at that time, no, sir.

40 It is agreed that on the 1st day of August, 1902, the defendant was master of the schooner William Neely; that she was a coastwise schooner owned by non-residents of the State of Virginia and engaged in coastwise trade between Virginia and New England, and did not hold a coastwise pilot license at that time; that demand was made upon the master for the payment of the amount of $87.75 and the payment of same was refused.

WILLIAM BRUCE MARTIN. [SEAL.]

VIRGINIA:

In the clerk's office of the court of law and chancery of the city of Norfolk on the 3rd day of December, 1903.

I, James V. Trehy, clerk of the said court of law and chancery of the city of Norfolk, do hereby certify that the foregoing and annexed is a true transcript of the record in the suit of Joseph J. Darden, pilot, plaintiff, against A. P. Thompson, master of the schooner Wm. Neely, defendant, lately pending in said court.

I further certify that said copy was not made up and completed until the plaintiff had had due notice of the making of the same, and the intention of the defendant to take an appeal therein.

Given under my hand this 3rd day of December, 1903.

JAMES V. TREHY, *Clerk.*

Fee for this record: $7.50.

41 VIRGINIA:

In the Supreme Court of Appeals of Virginia, Held at the Library Building, in the City of Richmond, on the 8th Day of December, 1903.

This day the defendant, Abram P. Thompson, presented in open court his petition for a writ of error to the court of law and chancery of the city of Norfolk, and a supersedeas to the judgment rendered

against him in favor of Joseph J. Darden, pilot, in said court on October 29, 1903; but this court being of opinion that the said judgment in said case is plainly right, it is ordered that the said petition be rejected and that a writ of error and supersedeas be refused.

Transcript $15.50

42 In the Supreme Court of Appeals of Virginia, at Richmond, Virginia.

DARDEN, Pilot,
vs.
THOMPSON, Master Sch. Wm. Neely.

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, H. Stewart Jones, clerk of the supreme court of appeals of Virginia, at Richmond, Virginia, do hereby certify that the foregoing printed record contained in nineteen pages and one page of index, and twenty-one additional manuscript pages, is a true and perfect transcript of the record of the suit aforesaid remaining in the clerk's office of the said court at the city of Richmond, Virginia, upon which said record the said case was heard, tried and determined by the court aforesaid.

In witness and attestation whereof I hereunto set my hand and affix the seal of said court at Richmond, Virginia, on this the 10th day of December, 1903.

[Stamp.]

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES.

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, James Keith, one of the judges and president of the supreme court of appeals of Virginia, do hereby certify that the attestation of the above record of Darden, pilot, *vs.* Thompson, master sch. Wm. Neely, remaining in the clerk's office of the said court at Richmond, Virginia, made by H. Stewart Jones, the clerk of said court at Richmond, aforesaid, is in due form.

Given under my hand and seal this the 10th day of December 1903.

JAMES KEITH. [SEAL.]

43 Supreme Court of Appeals of Virginia.

JOSEPH J. DARDEN, Pilot,
vs.
ABRAM P. THOMPSON.

Assignment of Errors.

Abram P. Thompson, the defendant, comes and files herewith his petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled cause, and makes the following assignment:—

First. The supreme court of appeals of Virginia erred in reversing the judgment of the court of law and chancery of the city of Norfolk on the demurrer, and in holding the Virginia pilot law not to be in conflict with the Constitution of the United States. The validity of said law was denied and drawn in question by the defendant in error on the ground of its being repugnant to the Constitution of the United States and in contravention thereof in the following particulars:

1. It is in conflict with section 10, article 1 of the United States Constitution wherein it is provided that: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

2. It is in conflict with section 4237 of the United States Revised Statutes, which provides:

"No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

44 3. It is in conflict with article 4, section 2, paragraph 1 of the United States Constitution wherein it is provided that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.

4. It is in conflict with section 1 of the fourteenth amendment to the United States Constitution, which provides that no State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; and which forbids any State from depriving any person of life, liberty or property without due process of law.

5. It is in conflict with section 4236 of the United States Revised Statutes which provides as follows:—

"The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port."

6. It is in conflict with article 1, section 8, paragraph 3 of the United States Constitution, which provides that Congress shall regulate the commerce among the several States and with foreign nations, and that no State shall lay any duty on tonnage.

7. It is in conflict with the act of December 1, 1898, respecting licensed officers on sailing vessels of over 700 tons.

Second. The said court erred in refusing a writ of error and supersedeas to the court of law and chancery, which court refused to instruct the jury as prayed by this defendant in bill of exceptions No. 1, and also refused to set aside the verdict and grant a new trial on the grounds set out in bill of exceptions No. 2; also overruled the defendant's motion in arrest of judgment. All
45 these different motions and requests of the defendant raised the question of the constitutionality of the Virginia pilot law on the same grounds as those just above set forth.

For which errors the defendant, Abram P. Thompson, prays that the judgment of the supreme court of appeals of Virginia refusing a writ of error and supersedeas, which is dated December 8th, 1903, be reversed, and a judgment entered for the defendant and for costs.

ROB'T M. HUGHES,
Attorney for Abram P. Thompson.

46 Supreme Court of Appeals of Virginia.

JOSEPH J. DARDEN, Pilot,
vs.
ABRAM P. THOMPSON.

Petition for Writ of Error.

The defendant considering himself aggrieved by the final decision of the supreme court of appeals of Virginia in refusing him a writ of error in the above entitled cause to the court of law and chancery of the city of Norfolk, hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States. Assignment of errors is hereto attached.

ROB'T. M. HUGHES,
Attorney for Defendant.

Supreme Court of Appeals of Virginia.

Let the writ of error issue upon the execution of a bond by the defendant, Abram P. Thompson, to the plaintiff, Joseph J. Darden, in the sum of two hundred dollars; said bond when approved to act as a supersedeas.

Dated December 8th, 1903.

JAMES KEITH,
President and Presiding Judge of the Supreme Court of Appeals of Virginia.

47 Supreme Court of the United States.

JOSEPH J. DARDEN, Pilot,
vs.
ABRAM P. THOMPSON.

Bond.

Know all men by these presents, that we, the Virginia-Carolina Trust Company, a corporation organized under the laws of the State of Virginia, with its principal office in the city of Norfolk, as principal, and Robert M. Hughes, as surety, are held and firmly bound unto Joseph J. Darden, in the sum of two hundred dollars, to be paid to the said Joseph J. Darden, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 8th day of December, A. D. 1903.

Whereas, the above-named defendant in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of appeals of Virginia;

Now, therefore, the condition of this obligation is such that if the above-named defendant in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

VIRGINIA-CAROLINA TRUST COMPANY,
By W. W. MOSS, *President.*

Attest: GEORGE J. TUOHY, *Secretary.*
ROB'T M. HUGHES. [SEAL.]

47½ The above bond is approved.

JAMES KEITH,
President and Presiding Judge of the Supreme Court of Appeals of Virginia.

The original of the foregoing supersedeas bond was lodged with the clerk of the supreme court of appeals of Virginia on December 8th 1903, and the following endorsement made thereon: Bond. Filed, December 8th, 1903.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

48 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of appeals of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals of Virginia before you, at Wytheville at the June term 1903 thereof, between Joseph J. Darden, plaintiff and Abram P. Thompson, defendant, a manifest error hath happened, to the great damage of the said defendant Abram P. Thompson as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of December, in the year of our Lord one thousand nine hundred and three.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia,
By JOSEPH P. BRADY,
Dep'y Clerk.

Allowed by
JAMES KEITH,
President Supreme Court of Appeals, Virginia.

[Endorsed:] Writ of error. Filed December 8, 1903.

49 The original of the foregoing writ of error was lodged with the clerk of the supreme court of appeals of Virginia on December 8th 1903, and also at the same time and place a copy thereof for the plaintiff, Joseph J. Darden. The following endorsement was made upon the said original writ and upon the copy: Writ of error. Filed, December 8th, 1903.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

50 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Joseph J. Darden, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of appeals of Virginia, wherein you are plaintiff and Abram P. Thompson is defendant in error, to show cause, if any there be, why the judgment rendered against the said defendant in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the chief justice of the supreme court of appeals of Virginia, this 8th day of December, 1903.

JAMES KEITH,
President and Presiding Judge of the Supreme Court of Appeals of Virginia.

Attest: H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

Service accepted December 8th, 1903.
R. C. MARSHALL,
D. TUCKER BROOKE,
Attorneys for Joseph J. Darden.

51 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, } *ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said supreme court of appeals, in the city of Richmond, this December 10th, 1903.

[Stamp.]

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

Endorsed on cover: File No. 19,170. Virginia supreme court of appeals. Term No. 519. Abram P. Thompson, plaintiff in error, *vs.* Joseph J. Darden. Filed December 18", 1903. File No. 19,170.